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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte RABINDRANATH DUTTA

Appeal 2007-2268
Application 09/726,268
Technology Center 2100

Decided: December 26, 2007

Before KENNETH W. HAIRSTON, JAY P. LUCAS, and
ST. JOHN COURTENAY III, *Administrative Patent Judges*.

COURTENAY, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134(a) from the Examiner's rejection of claims 1, 3-7, 9-13, 15-19, 21-25, 27-31, and 33-36. Claims 2, 8, 14, 20, 26, and 32 have been cancelled. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

THE INVENTION

The disclosed invention relates generally to a method, system, and program for providing access time information when displaying network addresses. More particularly, Appellant's invention is directed to providing access time information when displaying network addresses in a web browser program (Spec. 1).

Independent claim 1 is illustrative:

1. A method for rendering network addresses of files capable of being downloaded over a network on an output device, comprising:
 - generating a list of previously accessed network addresses;
 - for each listed network address, determining a time to download a page and any embedded files in the page from the network address over the network in response to downloading the page and any embedded files from the network address;
 - storing each determined time with the network address for which the time was determined;
 - determining an access time indicator for the network addresses based on the determined times stored with the network addresses, wherein the determined access time indicator is capable of indicating at least two different access times with respect to one network address; and
 - rendering the access time indicator when rendering the network address on the output device.

THE REFERENCES

The Examiner relies upon the following references as evidence in support of the rejections:

Barrett	US 5,727,129	Mar. 10, 1998
Killian	US 6,438,592 B1	Aug. 20, 2002
Barrick	US 6,625,647 B1	Sep. 23, 2003
Schneider	US 6,760,746 B1	Jul. 6, 2004

International Business Machines Corporation, Research Disclosure No. 438161, Kenneth Mason Publications Ltd., (“Research Disclosure”) (2000).

THE REJECTIONS

1. Claims 1, 3, 7, 12, 13, 15, 19, 24, 25, 27, 31, and 36 stand rejected under 35 U.S.C. § 102(a) as being anticipated by Research Disclosure.
2. Claims 4, 6, 16, 18, 28, and 30 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Research Disclosure in view of Barrett.
3. Claims 5, 9, 17, 21, 29, and 33 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Research Disclosure, in view of Barrett, and further in view of Barrick.
4. Claims 11, 23, and 35 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Research Disclosure in view of Schneider.
5. Claims 10, 22, and 34 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Research Disclosure in view of Killian.

Anticipation

PRINCIPLES OF LAW

In rejecting claims under 35 U.S.C. § 102, “[a] single prior art reference that discloses, either expressly or inherently, each limitation of a claim invalidates that claim by anticipation.” *Perricone v. Medicis Pharm. Corp.*, 432 F.3d 1368, 1375-76 (Fed. Cir. 2005) (citation omitted).

Claims 1, 3, 7, 12, 13, 15, 19, 24, 25, 27, 31, and 36

We consider the Examiner’s rejection of claims 1, 3, 7, 12, 13, 15, 19, 24, 25, 27, 31, and 36 as being anticipated by the Research Disclosure reference. Since Appellant’s arguments with respect to this rejection have treated these claims as a single group which stand or fall together, we will select independent claim 1 as the representative claim for this rejection. *See* 37 C.F.R. § 41.37(c)(1)(vii)(2006).

Appellant contends that Research Disclosure does not disclose the claim limitations of “determining a time to download a page and any embedded files in the page . . . ;” (App. Br. 9; *see* claim 1). Specifically, Appellant contends that Research Disclosure does not disclose that the time to download includes both the time to download the page and any embedded files (*Id.*).

The Examiner disagrees. The Examiner contends that web pages were known at the time of the Research Disclosure reference to be linked together with hyperlinks. Therefore, the Examiner concludes that the download time of a web page as disclosed in the Research Disclosure reference must (i.e., inherently) include the time to download any linked embedded files referenced within the web page (Ans. 15).

We begin our analysis by noting that “[i]n relying upon the theory of inherency, the Examiner must provide a basis in fact and/or technical reasoning to reasonably support the determination that the allegedly inherent characteristic *necessarily* flows from the teachings of the applied prior art.” *Ex parte Levy*, 17 USPQ2d 1461, 1464 (BPAI 1990) (emphasis in original). Here, the Examiner, as finder of fact, has determined that the download time of a web page as disclosed in the Research Disclosure reference inherently includes the time to download any linked embedded files referenced within the web page, such as images (*see* Ans. 15).

After considering the record before us, we find the evidence supports the Examiner’s position. We agree with the Examiner that embedded files (e.g., images) must be downloaded to completely render the contents of a web page. Therefore, we find the “time value” disclosed by Research Disclosure inherently includes the time to download the web page and any embedded files referenced by the web page. Thus, we find the Examiner has provided a rationale in the answer that reasonably supports the Examiner’s finding of inherent anticipation. “[A]fter the PTO establishes a *prima facie* case of anticipation based on inherency, the burden shifts to appellant to ‘prove that the subject matter shown to be in the prior art does not possess the characteristic relied on.’” *In re King*, 801 F.2d 1324, 1327 (Fed. Cir. 1986) (quoting *In re Swinehart*, 439 F.2d 210, 212-13 (CCPA 1971)). *See also* MPEP §§ 2112 (IV.), (V.). Here, while we have fully considered Appellant’s arguments, we find Appellant has not met the burden of proving

with evidence that the subject matter shown to be in the prior art does not possess the characteristic relied on by the Examiner.

Appellant further submits that Research Disclosure does not disclose the claim limitation of “determining an access time indicator for the network addresses based on the determined times stored with the network addresses, wherein the determined access time indicator is capable of indicating at least two different access times with respect to one network address . . . ;” (App. Br. 9; *see* claim 1). In particular, Appellant contends that “[t]he time value and running average times mentioned in the cited Research Disclosure [reference] can have only one value, their actual calculated value.” (App. Br. 9).

The Examiner disagrees. The Examiner notes that the example disclosed in the Research Disclosure reference indicates a time value of 60 seconds with respect to one of the links. However, the Examiner, as finder of fact, has determined that the Research Disclosure time value is not limited to just one time value (i.e., not limited to just one access time). The Examiner reasons that the time value associated with a given link (URL) must be capable of indicating different time values as a web site improves or degrades its web servers over time. Thus, the Examiner finds the Research Disclosure time value must be *capable of* indicating at least two or more different access times with respect to one network address. Moreover, the Examiner notes that the Research Disclosure reference also discloses keeping a running average of the transfer times in the personal bookmarks of the user’s web browser (Ans. 15).

In the Reply Brief, Appellant counters that the claimed “access time indicator” indicates two different access times *at once*, instead of merely being capable of indicating just one of two values as argued by the Examiner (Reply Br. 3).

We find no limitation in independent claim 1 requiring the “access time indicator” to indicate two different access times *at once*, as argued by Appellant (*see* Reply Br. 3). To the contrary, we note that claim 1 merely recites: “wherein the determined access time indicator is *capable of* indicating at least two different access times with respect to one network address;” We broadly but reasonably construe the words “capable of” to also read on future access times, as interpreted by the Examiner. We note that patentability is based upon the claims. “It is the claims that measure the invention.” *SRI Int’l v. Matsushita Elec. Corp. of America*, 775 F.2d 1107, 1121 (Fed. Cir. 1985) (*en banc*). Here, we agree with the Examiner, and find that Research Disclosure discloses a displayed time value (i.e., access time indicator) that is *capable of* indicating at least two or more different access times with respect to one network address for successive accesses of the same network address.

In the Reply Brief, Appellant argues for the first time that the claimed “access time indicator” and “access times” are not identical because they are used in close proximity in the claim, as supported by *Bancorp Servs., L.L.C. v. Hartford Life Ins. Co.*, 359 F.3d 1367, 1373 (Fed. Cir. 2004) (*see* Reply Br. 2). In response, we note that *Bancorp Servs. L.L.C.* is not an intervening case. Additionally, we decline to consider this new argument that was not

previously raised in the Brief. *See Optivus Tech., Inc. v. Ion Beam Applications S.A.*, 469 F.3d 978, 989 (Fed. Cir. 2006) (an issue not raised in an opening brief is waived).

For at least the aforementioned reasons, we conclude Appellant has not established that the Examiner erred with respect to establishing a *prima facie* case of anticipation. Because we find the Research Disclosure reference discloses all that is claimed, we sustain the Examiner's rejection of representative claim 1 as being anticipated by Research Disclosure.

Pursuant to 37 C.F.R. § 41.37(c)(1)(vii), we have decided the appeal with respect to the remaining claims in this group on the basis of the selected claim alone. Therefore, we will sustain the Examiner's rejection of claims 3, 7, 12, 13, 15, 19, 24, 25, 27, 31, and 36 as being anticipated by Research Disclosure for the same reasons discussed *supra* with respect to representative claim 1.

Obviousness

PRINCIPLES OF LAW

“What matters is the objective reach of the claim. If the claim extends to what is obvious, it is invalid under § 103.” *KSR Int'l Co. v. Teleflex, Inc.*, 127 S. Ct. 1727, 1742 (2007). To be nonobvious, an improvement must be “more than the predictable use of prior art elements according to their established functions.” *Id.* at 1740. Appellant has the burden on appeal to the Board to demonstrate error in the Examiner's position. *See In re Kahn*, 441 F.3d 977, 985-86 (Fed. Cir. 2006) (“On appeal to the Board, an

applicant can overcome a rejection [under § 103] by showing insufficient evidence of *prima facie* obviousness or by rebutting the *prima facie* case with evidence of secondary indicia of nonobviousness.”) (quoting *In re Rouffet*, 149 F.3d 1350, 1355 (Fed. Cir. 1998)). Therefore, we look to Appellant’s Briefs to show error in the proffered *prima facie* case.

Combinability under 35 U.S.C. § 103

With respect to each obviousness rejection before us, Appellant contends the Examiner has provided insufficient evidence of motivation to combine the references (*see* App. Br. pp. 11, 13-15, 17, and 18-19).

In view of the Supreme Court's recent opinion in *KSR Int'l Co. v. Teleflex Inc.*, our analysis here does not turn upon whether the Examiner has provided an adequate teaching, suggestion, or motivation to combine the references. Instead, we view the question before us to be whether sufficient difference exists between the prior art and Appellants' claims to render the claims nonobvious. In *KSR*, the Supreme Court reaffirmed that "[w]hen a patent 'simply arranges old elements with each performing the same function it had been known to perform' and yields no more than one would expect from such an arrangement, the combination is obvious." *KSR*, 127 S. Ct. at 1740 (quoting *Sakraid v. Ag Pro, Inc.*, 425 U.S. 273, 282 (1976)).

This reasoning is applicable here. Regarding the combinability of the Research Disclosure reference with Barrett, we find the Research Disclosure web browser (that tracks download time) and Barrett's network addresses or URLs (Fig. 6) are merely familiar elements combinable according to known methods in a manner that would have yielded predictable results. Our reviewing court has reaffirmed that "[t]he combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results." *Leapfrog Enter., Inc. v. Fisher-Price, Inc.*, 485 F.3d 1157, 1161 (Fed. Cir. 2007) (quoting *KSR*, 127 S. Ct. at 1739).

We find this reasoning applies to each of the obviousness rejections on appeal. The Examiner merely relies on Barrick for its teaching of associating colors with various download times (*see* Barrick, col. 8, ll. 7-20). The Schneider reference is merely relied on for its teaching of a URL autocomplete feature (*see* Schneider, col. 7, ll. 18-20). Lastly, the Killian reference is merely relied on for its teaching of HTML tags (*see* Killian, col. 12, l. 59). For each of the Examiner's obviousness rejections, we find the cited references have complementary features (i.e., familiar elements) that would have reasonably led an artisan having ordinary skill and common sense to combine their teachings in the manner suggested by the Examiner.¹

On page 14 of the Brief Appellant further contends that the Examiner has engaged in hindsight in formulating the rejection of claims 5, 17, and 29.

We see no evidence of impermissible hindsight. Instead, we see familiar elements (i.e., color indicators on a display) combinable according to known methods in a manner that would have yielded predictable results (*see* claims 5, 17, and 29).

With respect to all claims on appeal, Appellant has not shown that the claimed combination of familiar elements produces any new function. Moreover, Appellant has not provided any factual evidence of secondary considerations, such as unexpected or unpredictable results, commercial

¹ *See In re Hoeschele*, 406 F.2d 1403, 1406-07 (CCPA 1969) (“[I]t is proper to take into account not only specific teachings of the references but also the inferences which one skilled in the art would reasonably be expected to draw therefrom . . .”).

success, or long felt but unmet need. Thus, we find Appellant's arguments unpersuasive that the cited references have been improperly combined by the Examiner.

Elements under 35 U.S.C. § 103

Dependent claims 4, 16, and 28

We consider the Examiner's rejection of claim 4 as being unpatentable over Research Disclosure in view of Barrett.

Appellant contends that changing the order of displaying URLs based on their number of visits (as taught by Barrett) does not teach or suggest the claim requirement of altering the display of the network address itself to render an access time indicator. Instead, Appellant contends that the cited columns 8 and 10 of Barrett discuss altering the order in which URLs are displayed based on the number of previous visits to the page (App. Br. 11).

After considering the record before us, we find Appellant's arguments are directed to the individual references in isolation rather than the combination of references as a whole. The Court of Appeals for the Federal Circuit has determined that one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. *In re Merck & Co., Inc.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986). Here, Barrett must be read, not in isolation, but for what it fairly teaches in combination with the prior art as a whole. The Examiner relies upon the Research Disclosure reference for teaching an access time indicator (*see* Ans. 6). The Examiner looks to the Barrett secondary reference for its teaching of altering the display of a network address on a display monitor

(*Id.*). We find the claim language “altering the display of the network address” broadly but reasonably encompasses arranging or ranking network addresses (URLs) according to the frequency of previous visits, as shown by Barrett in Figure 6. The Examiner’s rejection is based upon the *combination* of the Research Disclosure reference with Barrett.

For at least the aforementioned reasons, we conclude Appellant has not established that the Examiner erred with respect to establishing a prima facie case of obviousness. Therefore, we sustain the Examiner’s rejection of claim 4 as being unpatentable over the teachings of Research Disclosure in view of Barrett. Because claims 16 and 28 recite essentially the same limitations as claim 4, we sustain the Examiner’s rejection of these claims as being unpatentable over Research Disclosure in view of Barrett for the same reasons discussed above regarding claim 4.

Dependent claims 6, 18, and 30

We consider next the Examiner’s rejection of claim 6 as being unpatentable over Research Disclosure in view of Barrett.

Appellant contends that Barrett does not teach or suggest rendering an access time indicator of network addresses included in a page to display that are embedded in the page to display. Instead, Appellant contends the cited columns 8 and 10 of Barrett mention a web page providing information on a current page and previously visited pages, including statistical information on previously visited web pages (Fig. 6). Appellant contends that the cited columns 8 and 10 of Barrett do not teach the “network addresses of pages

within a displayed page are rendered with the access time indicator of the page.” (App. Br. 12).

We disagree for essentially the same reasons discussed above regarding the rejection of claim 4. Here, the Examiner again relies upon the Research Disclosure reference for its teaching of an access time indicator (*See* Ans. 7). The Examiner looks to the secondary Barrett reference for its teaching and/or suggestion of “a network address included in the page to display within the displayed page” (*see* claim 6; *see also* Barrett, Fig. 6; col. 8, ll. 49-61, col. 10, ll. 19-27; *see also* Ans. 7). We agree with the Examiner that the URLs (network addresses) shown in Barrett’s Fig. 6 reasonably teach and/or suggest the limitations of “a network address included in the page to display within the displayed page” (*see* claim 6; *see also* Barrett, Fig. 6). We note again that the Examiner’s rejection is based upon the *combination* of the Research Disclosure reference with Barrett.

For at least the aforementioned reasons, we conclude Appellant has not established that the Examiner erred with respect to establishing a *prima facie* case of obviousness. Therefore, we sustain the Examiner’s rejection of claim 6 as being unpatentable over the teachings of Research Disclosure in view of Barrett. Because claims 18 and 30 recite essentially the same limitations as claim 6, we sustain the Examiner’s rejection of these claims as being unpatentable over Research Disclosure in view of Barrett for the same reasons discussed above regarding claim 6.

Dependent claims 5, 17, and 29

We consider next the Examiner's rejection of claim 5 as being unpatentable over Research Disclosure in view of Barrett, and further in view of Barrick.

Appellant contends that although the cited Barrick reference discusses associating colors with different download performance levels, nowhere does Barrick, or other references, teach or suggest altering the display of the network address by displaying the network address in a color, such that the color provides an access time indicator. Instead, Appellant contends the cited Barrick reference concerns providing a qualitative assessment of the download performance for a page and that this information may be conveyed as information relative to an absolute scale, such as a color. Appellant contends there is no teaching, suggestion or mention in the cited Barrick reference of displaying network addresses in different colors as part of rendering an access time indicator for a list of previously accessed network addresses (App. Br. 14).

We disagree. We again find that Appellant's arguments are directed to the individual references in isolation rather than the combination of references as a whole. *See In re Merck & Co., Inc.* at 1097. Here, we find Barrick clearly teaches a "qualitative assessment" of green, yellow, and red colors associated with download speeds that are fast (less than 2 seconds), medium (greater than 2 seconds), and slow (greater than 4 seconds), respectively (*see* Barrick, col. 8, ll. 7-20). Given that Research Disclosure teaches an access time indicator (time value) that shows how many seconds it took to download a page, we agree with the Examiner that the cited

combination of Research Disclosure, Barrett, and Barrick reasonably teaches and/or suggests altering the display of the network address by displaying the network address in a color, such that the color provides an access time indicator.

For at least the aforementioned reasons, we conclude Appellant has not established that the Examiner erred with respect to establishing a *prima facie* case of obviousness. Therefore, we sustain the Examiner's rejection of claim 5 as being unpatentable over the teachings of Research Disclosure in view of Barrett and Barrick. Because claims 17 and 29 recite essentially the same limitations as claim 5, we sustain the Examiner's rejection of these claims as being unpatentable over Research Disclosure in view of Barrett and Barrick for the same reasons discussed above regarding claim 5.

Dependent claims 9, 21, and 33

Appellant contends that claims 9, 21, and 33 are patentable over Research Disclosure in view of Barrett and Barrick for the same reasons previously argued regarding claims 6, 18, and 30 (*see* App. Br. 15). Since we have found Appellant has failed to show error in the Examiner's rejection of claims 6, 18, and 30, we sustain the Examiner's rejection of claims 9, 21, and 33 for the same reasons previously discussed regarding claims 6, 18, and 30 as being unpatentable over Research Disclosure in view of Barrett.

Dependent claims 11, 23, and 35

We consider next the Examiner's rejection of claim 11 as being unpatentable over Research Disclosure in view of Schneider.

Appellant contends that although the cited column 7 mentions "autocomplete," nowhere does the cited Schneider reference teach or suggest the combination of requirements of rendering access time indicators for each network address in a list that begins with the receive characters the user entered. Appellant further contends that the cited references do not teach or suggest displaying access time indicators with addresses suggested by the "autocomplete" feature (App. Br. 16).

We disagree. We note the Examiner again relies upon the Research Disclosure reference for its teaching of an access time indicator (*See* Ans. 9). The Examiner looks to the secondary Schneider reference for its teaching of an "autocomplete feature [generated] from the URL history as text is entered into the location field" (*see* Schneider, col. 7, ll. 19-20; *see also* Ans. 10). The Examiner's rejection is based upon the *combination* of the Research Disclosure reference with Schneider. Given that Research Disclosure teaches an access time indicator (time value), we agree with the Examiner that the cited combination of Research Disclosure and Schneider reasonably teaches and/or suggests rendering access time indicators for each network address in a list that begins with the receive characters the user entered (i.e., an auto-completion feature), as well as displaying such access time indicators with addresses suggested with the "autocomplete" feature.

For at least the aforementioned reasons, we conclude Appellant has not established that the Examiner erred with respect to establishing a *prima*

facie case of obviousness. Therefore, we sustain the Examiner's rejection of claim 11 as being unpatentable over the teachings of Research Disclosure in view of Schneider. Because claims 23 and 35 recite essentially the same limitations as claim 11, we sustain the Examiner's rejection of these claims as being unpatentable over Research Disclosure in view of Schneider for the same reasons discussed above regarding claim 11.

Dependent claims 10, 22, and 34

We consider next the Examiner's rejection of claim 10 as being unpatentable over Research Disclosure in view of Killian.

Appellant contends that nowhere does the cited column 12 of Killian, or any other cited reference, teach or suggest generating nodes for each network address included in a page and then generating an attribute for each network address node implementing the access time indicator for the network address. Instead, Appellant contends the cited column 12 portion of Killian merely discusses that a page being downloaded may have tags (App. Br. 18).

The Examiner disagrees. The Examiner notes that Appellant claims, in pertinent part: "generating a document object including nodes for the tagged elements; [and] generating a node for each network address included in the page;" (*see* Ans. 22, ¶1; *see also* claim 10). In particular, the Examiner points out that the language of the claim does not require the nodes generated for each network address to be the same nodes associated with the tagged elements included in the generated document object (*Id.*).

In the Reply Brief Appellant “transverse[s] the Examiner’s finding that the claims do not claim that the generated node is for each network address because the claims recite ‘generating a node for each network address included in the page.’” (Reply Br. 7; *see also* claim 10).

After considering the record before us, we find Appellant has apparently misunderstood the Examiner’s position. The Examiner has construed the language of the claim as not requiring the nodes generated for each network address to be the same nodes associated with the tagged elements included in the generated document object (*see* Ans. 22, ¶1). Because Appellant has not directly addressed the Examiner’s point of argument in the Reply Brief, we find Appellant has failed to traverse the Examiner’s legal conclusion of obviousness by responding to the Examiner’s argument and explaining why the Examiner erred. We note that a statement which merely points out what a claim recites will not be considered an argument for separate patentability of the claim. *See* 37 C.F.R. § 41.37(c)(1)(vii)(2006). Therefore, we sustain the Examiner’s rejection of claim 10 as being unpatentable over the teachings of Research Disclosure in view of Killian. Because claims 22 and 34 recite essentially the same limitations as claim 10, we sustain the Examiner’s rejection of these claims as being unpatentable over Research Disclosure in view of Killian for the same reasons discussed above regarding claim 10.

OTHER ISSUE

In the event that prosecution is reopened in this application, we leave it to the Examiner to consider a 35 U.S.C. § 101 rejection of claims 25, 27-31, and 33-36 as being directed to non-statutory subject matter. From the Specification it is clear that the scope of the claimed “article of manufacture compris[ing] a computer readable medium including code” (independent claim 25) broadly encompasses “wireless transmission media, signals propagating through space, radio waves, infrared signals, etc.” (Spec. 11, ll. 1-3). This technology has been found to be non-statutory.

A claim directed to computer instructions embodied in a signal is not statutory under 35 U.S.C. § 101. *See In re Nuijten*, 500 F.3d 1346, 1357 (Fed. Cir. 2007) (“A transitory, propagating signal like Nuijten’s is not a ‘process, machine, manufacture, or composition of matter.’ Those four categories define the explicit scope and reach of subject matter patentable under 35 U.S.C. § 101; thus, such a signal cannot be patentable subject matter.”).

CONCLUSION OF LAW

Based on the findings of facts and analysis above, we conclude that Appellant has not shown the Examiner erred in rejecting claims 1, 3, 7, 12, 13, 15, 19, 24, 25, 27, 31, and 36 under 35 U.S.C. § 102(a) for anticipation. Likewise, we conclude that Appellant has not shown the Examiner erred in rejecting claims 4-6, 9-11, 16-18, 21-23, 28-30, and 33-35 under 35 U.S.C. § 103(a) for obviousness.

DECISION

The decision of the Examiner rejecting claims 1, 3-7, 9-13, 15-19, 21-25, 27-31, and 33-36 is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

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